Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

MICHAEL L. KATHREIN,

Petitioner,

v.

BRIGID M. McGRATH, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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Pro se Petitioner

QUESTIONS PRESENTED

The following questions are presented by the petitioner:

I. Does an American citizen have a Constitutional right to petition the federal grand jury to investigate crimes committed against him?

II. Does an American citizen have a statutory right to petition the federal grand jury to investigate crimes committed against him?

III. Do members of the executive or judicial branches of government have the authority to block access to the grand jury?

PARTIES BELOW

Petitioner Michael L. Kathrein was the plaintiff-appellant in three appeals that were consolidated in the court below. Respondents Brigid M. McGrath, Michael P. Monar, Jeffrey R. Rosenberg, Daniel V. Kinsella, Schuyler, Roche & Zwirner, and Paddy H. McNamara were defendants-appellees in one case and R.J. Siegel was the defendant-appellee in the other two cases in the court below.

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Proceedings Against The Earl Of Shaftesbury, 8 How. St. Tr. 759, 773 (1681) 11

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PETITION FOR WRIT OF CERTIORARI

Michael L. Kathrein, on behalf of himself, hereby petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit, filed on February 7, 2006. There was no good-faith determination of the law in petitioner's consolidated cases in either the district court or in the Seventh Circuit Court of Appeals.

OPINIONS BELOW

The unreported Court of Appeals' Opinion affirming the judgment of the consolidated cases of the district court, entered February 7, 2006, is reproduced at Pet. App. 1. The District Court's final judgment of June 9, 2005 is reproduced at Pet. App. 13, its June 28, 2005 judgment is reproduced at Pet. App. 20 and App. 39, and its August 23, 2005 judgment is reproduced at App. 33.

JURISDICTIONAL STATEMENT

The Court of Appeals' final judgment was entered on February 7, 2006. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the First and Fifth Amendments to the United States Constitution.

The First Amendment, U.S. Constitution, provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

The Fifth Amendment, U.S. Constitution, provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATUTORY PROVISIONS INVOLVED

This case involves Federal Rule of Criminal Procedure 6(a) and Title 18 U.S.C. § 3332(a).

Federal Rule of Criminal Procedure 6(a) provides:

> (a) Summoning a Grand Jury.
>
> (1) *In General.* When the public interest so requires, the court must order that one or more grand juries be summoned. A grand jury must have 16 to 23 members, and the court must order that enough legally qualified persons be summoned to meet this requirement.
>
> (2) *Alternate Jurors.* When a grand jury is selected, the court may also select alternate jurors. Alternate jurors must have the same qualifications and be selected in the same manner as any other juror. Alternate jurors replace jurors in the same sequence in which the alternates were selected. An alternate juror who replaces a juror is subject to the same challenges, takes the same oath, and has the same authority as the other jurors.

Title 18 U.S.C. § 3332(a) provides:

> (a) It shall be the duty of each such grand jury impaneled within any judicial district to inquire into offenses against the criminal laws of the United States alleged to have been committed within that district. Such alleged offenses may be brought to the attention of the grand jury by the court or by any attorney appearing on behalf of the United States for the presentation of evidence. Any such attorney receiving information concerning such an alleged offense from any other person shall, if requested by such other person, inform the grand jury of such alleged offense, the identity of such other person, and such attorney's action or recommendation.

STATEMENT OF THE CASE

Jeffrey R. Rosenberg and Daniel V. Kinsella, of the law firm Schuyler, Roche & Zwirner, P.C., are attorneys employed by Michael P. Monar. The attorneys engaged in the practice of 'padding' their petitions for fees. Their acts were aided and abetted by two judges in the Circuit Court of Cook County, Brigid M. McGrath and Paddy H. McNamara. All are respondents.

When petitioner moved the two district court judges to convene a grand jury to investigate the mail frauds and other crimes perpetrated by the attorney respondents against petitioner, the lower courts avoided the questions and allegations within petitioner's complaints by the improper application of abstention doctrines.

The Seventh Circuit Court of Appeals dispensed with petitioner's request to have the lower courts convene, or allow access to a grand jury, as follows:

> Before leaving Kathrein's suit against Siegel, we address an argument he makes both here and in his appeal from the dismissal of his other federal

> complaint. In both federal actions Kathrein sought and was denied an order compelling a federal grand jury to investigate alleged crimes committed by the various defendants. In challenging those denials, Kathrein persists with his frivolous contention that he is entitled to appear before a grand jury to present his allegations. See *Korman v. United States*, 486 F.2d 926, 933 (7th Cir. 1973) (holding that authority to convene federal grand jury is vested in district court); cf. *Cook v. Smith*, 834 P.2d 418, 420-21 (N.M. 1992) (recognizing New Mexico's procedure permitting citizens to petition for convening a grand jury as rare). Kathrein admits that the goal of his proposed investigation is to lead to the prosecution of the individuals that he has sued, but a private citizen lacks standing to demand the prosecution of another. See *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973); *Johnson v. City of Evanston, Ill.*, 250 F.3d 560, 563 (7th Cir. 2001).

Note the words, "Kathrein persists in his frivolous contention that he is entitled to appear before a grand jury to present his allegations."

Kathrein's request is legitimate. It is supported by the Constitution, Congressional statute, a rule of federal criminal procedure, substantial case law, learned treatises and hundreds of years of common law practice. His approach may be unconventional and unwelcome, but frivolous it is not.

Petitioner's request is slighted by reflex. He moves to exercise a hoary right. A right of which ordinary citizens are unaware, that attorneys would not dare to seek, that prosecutors have no need to request, and that judges commonly believe, is not cognizable.

"It's a recession when your neighbor loses his job; it's a depression when you lose yours." – Harry S. Truman. Or in this case, it's frivolous when a common citizen asserts

this right; it's a legitimate argument when a member of the legal community does so.

Petitioner and millions of independents like him, are thusly separated from the protection of federal criminal law. They must accept whatever ration of justice the legal profession – judges and lawyers – is inclined to dispense.

REASONS FOR GRANTING THE WRIT

The Writ must be granted because the Seventh Circuit Court of Appeals' decision conflicts with the original intent of Federal Rule of Criminal Procedure 6, 18 U.S.C. § 3332(a), this Court's prior decisions, decisions of the other Circuit Courts of Appeals, and their own precedent.

As petitioner will also demonstrate, *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973) was wrongly decided and must be corrected either by this Court or by Congress.

I. An American citizen has a Constitutional right to petition the federal grand jury to investigate crimes committed against him.

The history of the grand jury plainly demonstrates that citizens have a right to present their evidence to the grand jury.

The First Amendment, U.S. Constitution, guarantees the right "to petition the government for redress of grievances." *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 81 S.Ct. 523 (1961) and *California Motor Transport Co. v. Trucking Unlimited*, 92 S.Ct. 609 (1972) hold that the Petition Clause protects people's rights to make their wishes and interests known to government representatives in the legislature, judiciary, and executive branches. *Noerr Motor Freight, Inc.*, 81 S.Ct. at 530-531, *Trucking Unlimited*, 92 S.Ct. at 611-612. See also *McDonald v. Smith*, 105 S.Ct. 2787, 2789 (1985) (noting that

James Madison in congressional debate on petition clause made clear that people have the right to communicate their will through direct petitions to the legislature and government officials).

No act of Congress can authorize a violation of the Constitution. *United States v. Brignoni-Ponce*, 95 S.Ct. 2574, 2578 (1975). The Constitution cannot be interpreted safely *except* by reference to common law and to British institutions as they were when the instrument was framed and adopted. *Ex Parte Grossman*, 45 S.Ct. 332, 333 (1925). That this applies with equal force to federal grand juries is equally clear. *Costello v. United States*, 76 S.Ct. 406, 408 (1956); *Blair v. United States*, 39 S.Ct. 468, 471 (1919); *In Re Grand Jury Proceedings*, 479 F.2d 458, 460-461 n. 2 (5th Cir. 1973) (collecting cases); *In Re Grand Jury January, 1969*, 315 F.Supp. 662, 675 (D. Md. 1970).

The Fifth Amendment had in view the rule of the *common law*, governing the mode of prosecuting those accused of crime. *Mackin v. United States*, 117 U.S. 348 (1886); *United States v. Deisch*, 20 F.3d 139, 145 n. 11 (5th Cir. 1994). The grand jury had common law origins. *In re April 1956 Term Grand Jury*, 239 F.2d 263, 268 (7th Cir. 1956).

Today's federal judges appear to have little or no understanding of how the grand jury operated under common law, or how rich was its tradition.

> The very fact of the presence of the prosecutor in the grand jury room *contradicts* the historically defined role of that body. How can the grand jury protect the accused from the accuser if the accuser is alone with the grand jury and can effectively *control* the course of its investigation?
>
> Schwartz, *Demythologizing The Grand Jury*, 10 American Criminal Law Review 701, 759 (1972); see also p. 758, n. 291.

> On November 3, 1806, Joseph Hamilton Daviess, United States Attorney for Kentucky, moved that a grand jury be convened to consider indicting Aaron Burr for attempting to involve the United States in a war with Spain. On December 3rd the grand jury was called. Daviess immediately moved "to be permitted to attend the grand jury in their room." This motion was considered "novel and unprecedented" and was denied. After hearing the evidence in secret the grand jury deliberated and, on December 5th, an ignoramus bill was returned.

Id. at 734.

See also *United States v. Burr*, Fed. Cas. No. 14,892 (C.Ct.D.Ky. 1806).

> A solicitor is *not* a judicial officer. He *cannot* administer an oath. He *cannot* declare law. He *cannot* instruct the grand jury in the law. That function belongs to the *Judge alone*. If the grand jury desire to be informed of the law or of their other duties, they *must* go into court and ask instructions from the bench.
>
> *Lewis v. The Board of Commissioners of Wake Co.*, 74 N.C. 194, 197-199 (Superior Court of Wake County, 1876), quoted with approval in *United States v. Virginia-Carolina Chemical Co.*, 163 F. 66, 75 (C.Ct.M.D. Tenn. 1908) and *United States v. Kilpatrick*, 16 Fed. 765 (D.C.W.D.N.C. 1883).
>
> [A grand jury is] "a spear in the hands of ambitious prosecutors anxious to silence dissent or to climb to greater political heights over the backs of hapless defendants caught up in the system."
>
> Abourzek, *The Inquisition Revisited*, 7 Barrister 19 (1980).

In this case, the judiciary and the executive branches steadfastly block petitioner's *access* to his fellow citizens on the grand jury.

As a federal judge in the nineteenth century remarked, "The moment the executive is allowed to control the action of the courts in the administration of criminal justice, their independence is *gone*." *In re Miller*, Fed. Cas. No. 9,552 (C.Ct.D.Ind. 1878).

> [I]t is clear that the emperor and his servants assumed more and more direct control of legal procedure, at first paralleling surviving courts and procedures, but eventually superseding them. Gradually the sources of law were narrowed down to one – the edict of the emperor.
>
> Peters, *Inquisition*, pp. 14-15 (1988).

That prosecutors were not allowed in the grand jury room, under the indictment by grand jury clause of the Fifth Amendment, was well understood in this country for over 100 years. See *United States v. Rosenthal*, 121 Fed. 862, 874 (S.D.N.Y. 1903) and the cases cited therein.

In order to overcome the *Rosenthal* decision and the intention of the Framers of the Fifth Amendment, Congress then enacted, on June 30, 1906, the statute that has come down to us as 28 U.S.C. § 515(a) and the Rule that has come down to us as Federal Rule of Criminal Procedure 6(d), permitting the attorneys for the government to "attend the grand jury in their room."

> The VICE-PRESIDENT. The bill will be read for the information of the Senate.
>
> The Secretary read the bill and there being no objection, the Senate, as in Committee of the Whole, proceeded to its consideration. It authorizes the Attorney-General, the Solicitor-General, the Assistant to the Attorney-General, the Assistant Attorneys-General, special assistants to the Attorney-General, special assistants to the district attorneys, and special counsel appointed under any provision of law to begin and conduct any kind of legal proceeding, civil or criminal, in any court of any judicial district, or before any

commission or commissioner or quasi-judicial body created under the laws of the United States, including grand jury proceedings, whether they reside in the judicial district where such proceedings are brought or not. But all such proceedings shall be begun and conducted by such officials, attorneys, and counsel only under the direction, supervision, and control of the Attorney-General.

Mr. HOPKINS. I should like to have the Senator presenting the bill give a little explanation of the reason for the legislation.

Mr. KNOX. I ask that the report on the bill, which is less than half a page, be read. It is the most succinct statement of the purpose of the bill I could possibly suggest.

The VICE-PRESIDENT. The report will be read.

The Secretary read the report submitted by Mr. Knox, May 28, 1906, as follows:

The Committee on the Judiciary, to whom was referred the bill (S. 2969) authorizing the Attorney-General and certain other officers of the Department of Justice to conduct legal proceedings in any court of the United States, having considered the same, report the bill favorably without amendment. It is frequently desirable and even necessary that the Attorney-General should detail an officer of his Department to assist some United States attorney in the investigation and prosecution of cases of unusual importance or interest, or to make an independent investigation and report the result to the Department, and, if necessary, to prosecute the same; or, where this latter is impracticable, to appoint a special assistant to the Attorney-General, particularly in criminal matters.

> In 1903 the Attorney-General appointed a special assistant to investigate and report in the Japanese silk fraud cases, and it was held (121 Fed. Rep. 826, *U. S. v. Rosenthal*) that a special assistant to the Attorney-General is not an officer of the Department of Justice under sections 359 and 367, Revised Statutes, or other provisions of the United States Statutes, and the indictment was quashed because of the presence of this attorney in the grand jury room. *That case further holds that neither the Attorney-General, the Solicitor-General, nor any officer of the Department has the power to conduct or aid in the conduct of proceedings before a grand jury.* It is clearly of great importance that they should have this power.
>
> Congressional Record, pp. 7913-7914 (June 6, 1906).

I.e., one hundred years ago this June, the Congress took the common law right to petition the grand jury away from the people and gave it to the Department of Justice.

The Congress cannot – merely by legislating – amend the Constitution. *United Transp. Union v. I.C.C.*, 891 F.2d 908, 915-916 (D.C. App. 1989). [Congress] . . . is not given power by itself . . . to amend the Constitution. *Myers v. United States*, 47 S.Ct. 21, 37 (1926), *In re Young*, 141 F.3d 854, 859 (8th Cir. 1998). The legislature cannot enact laws for the accomplishment of objects not entrusted to the federal government. *Linder v. United States*, 45 S.Ct. 446 (1925).

No one in 1791 entrusted the federal government with the authority to enact laws intended to turn the grand jury into a rubber stamp for federal prosecutors. Ironically, federal prosecutors employed by the Department of Justice did not even *exist* until late in the following century. The Department of Justice is wholly a creation of Congress, June 22, 1870. At its creation the *only* authority members of that agency possessed was to "have the case of prosecutions for mail depredations and penal offenses against the

postal laws," Sec. 7, and to "compile statistics of crime," Sec. 12, 16 U.S. Statutes At Large 162-164.

The grand jury is a pre-constitutional institution, given constitutional stature by the Fifth Amendment. *United States v. Chanen*, 549 F.2d 1306, 1312 (9th Cir. 1977). If this is in fact true, then the grand jury would have to function in the same manner and fashion as its British predecessor, anything less would constitute an unconstitutional procedure:

> "I know not how long the practice in that matter of admitting counsel to a grand-jury hath been; I am sure it is a very unjustifiable and unsufferable one. If the grand-jury have a doubt in point of law, they ought to have recourse to the court, and that publicly, and not privately, and not to rely upon the private opinion of counsel, especially of the king's counsel, who are, or at least behave themselves as if they were parties."
>
> Sir John Hawles, *Remarks on Colledge's Trial*, 8 How. St. Tr. 724 (1681).

The Declaration of Rights of 1689 is antecedent of our own constitutional text. The original meaning and circumstances of that enactment are relevant. See *Harmelin v. Michigan*, 111 S.Ct. 2680, 2687 (1991).

Merely *allowing* a prosecutor in the grand jury room was a violation of the grand jurors' oath. *Proceedings Against The Earl Of Shaftesbury*, 8 How. St. Tr. 759, 773 (1681), quoted in *Hale v. Henkel*, 26 S.Ct. 370, 373 (1906).

To this day this is the law in Connecticut State grand juries. *Cobbs v. Robinson*, 528 F.2d 1331, 1338 (2d Cir. 1975).

Under the procedures followed by our ancestors before their migrations from England the prosecution of offenses was left entirely to private persons, or to public officers who acted in their capacity of private persons and who had hardly any legal powers beyond those which belonged to

private persons. Stephen, *A History of the Criminal Law of England*, Volume I, at 493, quoted in *United States v. Marion*, 92 S.Ct. 455, 468 n. 2 (1971).

The idea of a public prosecutor is a *French* practice. *Id.*

The English practice was that followed in the United States for some time. *Id.*

Private individuals conducted the bulk of prosecutions in colonial times. Dongel, *Is Prosecution A Core Executive Function? Morrison v. Olson and the Framers Intent*, 99 Yale L. J. 1069 (1990). See also *United States v. Baird*, 85 F. 633 (C.Ct.D.N.J. 1897) (complaint by postal inspector); *In Re Price*, 83 F. 830 (C.Ct.S.D.N.Y. 1897) (complaint by private citizen); *United States v. Farrington*, 5 F. 343, 346 (D.C.N.Y. 1881) (evidence of grand jurors competent to ascertain who *was* prosecutor).

II. An American citizen has a statutory right to petition the federal grand jury to investigate crimes committed against him.

Petitioner devoted thirty pages and cited nearly two hundred authorities in his 'frivolous' lower court briefs supporting his right to access the federal grand jury. His arguments were dismissed with one sentence. This would hardly reflect an earnest deliberation.

> Painting black lines on the sides of a horse and calling it a zebra does not make it one.
>
> *United States v. Vazquez-Rivera*, 135 F.3d 172, 177 (1st Cir. 1998).
>
> The bending of the meanings of words is symptomatic of a diseased institution, with the angle of linguistic deflection indicating the seriousness of the cancer within. The Spanish Inquisition represented an advanced case. *Rawson's Dictionary of Euphemisms and Other Doubletalk*, rev. ed., p. 35 (1995).

> "When *I* use a word," Humpty Dumpty said, in rather a scornful tone, "it means just what I choose it to mean – neither more nor less."
>
> "The question is," said Alice, "whether you *can* make words mean so many different things."
>
> "The question is," said Humpty Dumpty, "which is to be master – that's all."
>
> Lewis Carroll, *The Annotated Alice: Alice's Adventures In Wonderland & Through The Looking Glass*, p. 269 (Martin Gardner 1960).

Alice-in-Wonderland was a world in which words had no meaning. *Welch v. United States*, 90 S.Ct. 1792, 1803 (1970).

> [U]ltimately, the guarantee of [our] rights is no stronger than the integrity and fairness of the judge to whom the trial is entrusted.
>
> *Bracy v. Gramley*, 81 F.3d 684, 703 (7th Cir. 1996) (dissent), *reversed*, 520 U.S. 899, 117 S.Ct. 1793 (1997).

The dishonest application of the English language by the lower courts demonstrates that the rights granted to American citizens in their Constitution are [in effect] merely licensed. Citizens must pray to the legal community for leave to assert those rights. Where their prayers are blocked, their rights are denied. The legal community has control over their right to assert their guaranteed rights, *i.e.*, they are *not* inalienable, they are dispensed at will.

> ROBERTS: "So to the extent you are talking about the injustices in society and the discrimination in society, the best thing the courts can do is enforce the rule of law and provide a level playing field for people to come in and vindicate their rights and enforce the rule of law."
>
> Judge John Roberts, Transcript of Senate Confirmation Hearing, September 13, 2005.

By its redefinition of words, the lower court amended the Constitution and denied Kathrein the right to petition a

mechanism of his government for the redress of his grievances.

The prosecutor was a private individual. *United States v. Rawlinson*, 27 Fed. Cas. 715, Fed. Case No. 16,123 (C.Ct.D.C. 1802) (Court of the opinion his name should be written at foot of the indictment); *United States v. Shackelford*, 27 Fed. Cas. 1037, Fed. Case No. 16,261 (C.Ct.D.C. 1828) (indictment quashed).

The "prosecutor" means a person who prosecutes in the name of the United States, or in the name of the United States and himself. *United States v. Sandford*, 27 Fed. Case 952, Fed. Case No. 6,221 (C.Ct.D.C. 1806).

Public prosecutors are ... not part of America's heritage from British common law. Jacoby, *The American Prosecutor: A Search For Identity*, p. 7 (1980).

[U]ntil 1853 there was nowhere any general, organized control of Federal prosecution. *Id.* at p. 20.

U.S. Attorneys and their subordinates use dishonest application of the language to avoid culpability in the denial of citizen's rights. Compare a request petitioner submitted to the U.S. Attorney, Exhibit A, App. 40, with the deflective response petitioner received two weeks later, Exhibit B, App. 43.

The improper motives and methods of today's prosecutors, *i.e.*, government attorneys, have become systemic.

> Centac can identify the Exxons of international crime, can pursue them, infiltrate them, gather roomsful of intelligence and evidence against them. But it cannot prosecute them. Only U.S. Attorneys can do that. And U.S. Attorneys around the country are not in a hurry to tie up prosecutors on such time-consuming, highly complex conspiracy cases. Buy-bust cases, swift and simple, are easier, more immediately gratifying, and visible to the voters. Centac frequently

> finds itself facing the same old problem – how to find a prosecutor with the intelligence, energy, and humility to study, master, and bring to trial a case with dozens of defendants, hundreds of witnesses, and documentation filling a roomful of filing cabinets.
>
> This time the problem's name is Scott Miller. The Steinberg Centac has been promised two full-time prosecutors and one part-time, but has received only Scott Miller, who is very part-time indeed. He is a whiz at buy-bust prosecutions, and DEA agents who like rapid-fire, cops-and-robbers cases speak highly of him. He is not about to spend months laboriously unraveling the intricate relationships of hundreds of Steinberg employees and associates. Better to indict Steinberg and a couple of top executives, bask momentarily in the headlines, and let it go at that. He justifies this philosophy with a boast. "I don't want sparrows, I want peacocks." Centac is based on the proposition that peacocks cannot exist without sparrows. Sparrows grow up to be peacocks. Donald Steinberg was once a sparrow. So was Sicilia-Falcon. So was Lu Hsu-shui. Miller isn't listening. He is a close friend of Pat Sullivan, chief of the criminal division in the South Florida U.S. Attorney's Office. It was Sullivan who, after his meeting in Washington with Dennis Dayle and other prosecutors, assigned Scott to the Steinberg Centac. To convince Sullivan to remove Scott, his friend, would be a delicate, difficult operation.
>
> James Mills, *The Underground Empire, Where Crime and Governments Embrace*, pp. 439-440 (Doubleday & Co. 1986).

To be independent and informed, the grand jury must be able to obtain all relevant evidence, since only then can its judgment truly be informed. *United States v. Mandujano*,

425 U.S. 564, 573, 96 S.Ct. 1768, 48 L.Ed.2d 212 (1976) (plurality opinion); *United States v. Calandra*, 414 U.S. 338, 343-44, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974).

The wisdom of maintaining grand jury independence from a public prosecutor has deep roots in our system of justice.

> A grand juror cannot carry on systematic persecution against a neighbor whom he hates, because he is not permanent in the office. The judges generally, by a charge, instruct the grand jurors in the infractions of law which are to be noticed by them; and our judges are in the habit of printing their charges in the newspapers.
>
> *Thomas Jefferson to Edmund Randolph*, 1793. ME 9:83.
>
> They bring into the grand jury room the experience, knowledge and viewpoint of all sections of the community. They have no axes to grind and are not charged personally with the administration of the law. No one of them is a prosecution attorney or law-enforcement officer ferreting out crime.
>
> *In Re Groban's Petition*, 77 S.Ct. 510, 520 (1957) (dissent).

III. Members of the executive and judicial branches of government do not have the authority to block a citizen's access to the federal grand jury.

Petitioner relied upon the following authorities in his "frivolous" request to present evidence of criminal wrongdoing to a federal grand jury.

The Seventh Circuit completely failed to address *Application of Wood*, 833 F.2d 113 (8th Cir. 1987) (district court judge ordered U.S. Attorney to present petitioner's evidence to federal grand jury).

> [The grand jurors] are not appointed for the prosecutor or for the court, they are appointed for the government

and for the *people*. *Hale v. Henkel*, 26 S.Ct. 370, 373 (1906).

Shall diligent inquiry be enjoined? *Id.* at 374.

Members of the grand jury are supposed to act *independently* of either the prosecuting attorney or judge. See *United States v. Singer*, 660 F.2d 1295, 1302 n. 14 (8th Cir. 1981).

If federal judges and U.S. Attorneys block or control the flow of information about criminal violations of federal law, all grand jury independence is lost.

> A grand jury is a group of 16-23 individuals drawn at random from the citizens of this district. They are impaneled by order of the Chief Judge of this Court. Their role as an independent body is to inquire into alleged violations of the law to ascertain whether the evidence presented by the government is sufficient to warrant a trial by a petit jury or judge. The grand jury has broad investigative authority due its ability to compel testimony, to order the production of documents and its power to indict.
>
> *Grand Jury Foreperson's Handbook*, U.S. District Court for the Northern District of Illinois, Eastern Division (8/97).

The longstanding principle is that the public has a right to every man's evidence is *particularly* applicable to grand jury proceedings. *Branzburg v. Hayes*, 92 S.Ct. 2646, 2660 (1972) (citations omitted).

> Principles of law, whether embodied in the Constitution and laws of the United States, the Federal Rules of Criminal Procedure or the local rules of court must remain fixed and secure. The strictures government court and prosecutor alike are designed to insure that the processes of criminal justice are carried out with care and deliberation, for were the law applied casually, and without thought, the result would not be justice,

> and the enforcers of the law would become merely the custodians of power.
>
> *McCarthy v. Manson*, 554 F.Supp. 1275, 1279 (D. Conn. 1982).

Where there are no remedies, there are no rights. Where the U.S. District Court for the Northern District of Illinois and the Seventh Circuit Court of Appeals deny petitioner's remedies, they deny his rights. Petitioner's remedy is unfiltered access to the federal grand jury to present his evidence of violations of federal statutes against him by the respondents.

> It is the duty and right . . . of every citizen to assist in prosecuting, and in securing the punishment of any breach of the peace of the United States. *In re Quarles*, 15 S.Ct. 959, 960-961 (1894).
>
> [A citizen] has a constitutional right to inform the government of violations of federal law . . . [a] privilege of citizenship guaranteed by the Fourteenth Amendment. *Equal Employment Opportunity Commission v. Pacific Press Publishing Association*, 676 F.2d 1272 (9th Cir. 1982).
>
> [I]nforming is a right or privilege secured by the Constitution or laws of the United States. *Velarde-Villarreal v. United States*, 354 F.2d 9 n. 3 (9th Cir. 1965).

The grand jury can insist upon the production of every person's testimony. *In re Subpoened Grand Jury Witness*, 171 F.3d 511, 513 (7th Cir. 1999).

The grand jury cannot review what it cannot (is not allowed to) see.

The Federal Rules of Criminal Procedure . . . have the force of statute. *United States v. Christian*, 660 F.2d 892, 899 (3d Cir. 1981).

If this Rule [6(a)] is applied with full force in the Virgin Islands, it arguably would confer on the district court the authority to convene a grand jury to investigate crimes and indict where it found probable cause. *Id.* at 900.

There is a power that the court does not have – the power to fundamentally alter the historic relationship between the grand jury and its constituting court. *Whitehouse v. United States District Court For District of Rhode Island*, 53 F.3d 1349, 1357 (1st Cir. 1995) quoting *United States v. Williams*, 112 S.Ct. 1735, 1744 (1992).

As the case history cited herein illustrates, most of today's federal judges exercise no deference to that "historic relationship."

> At the outset, I would point out that plaintiffs do not seek to compel the U.S. Attorney to prosecute the named defendants. Rather, they seek to have either the court or the United States Attorney present certain information to the grand jury. This distinction is critical because almost the entirety of the opposition to plaintiffs' motion is based on the mischaracterization by the U.S. Attorney and the other defendants of plaintiffs' motion as one seeking to compel the U.S. Attorney to initiate proceedings against the other defendants.
>
> *In Re Grand Jury Application*, 617 F.Supp. 199, 201 (S.D.N.Y. 1985).

I.e., The Seventh Circuit applied the identical mischaracterization in *its* ruling.

> "Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute." *Linda R.S. v. Richard D.*, 410 U.S. 614, 617, n.3, 93 S.Ct. 1146, 35 L.Ed.2d 536 (1973). *See Warth v. Seldin*, 422 U.S. 490, 500, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975); *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 212, 93

> S.Ct. 364, 34 L.Ed.2d 415 (1972) (White, J., concurring); *Hardin v. Kentucky Utilities Co.*, 390 U.S. 1, 6, 88 S.Ct. 651, 19 L.Ed.2d 787 (1968). When determining whether a plaintiff has standing, I need only examine the complaint to see if the plaintiff has alleged that he has suffered a cognizable injury. *Nash v. Califano*, 613 F.2d 10, 14 (2d Cir. 1980). 18 U.S.C. § 3332(a) creates a duty on the part of the United States Attorney that runs to the plaintiffs, and the breach of that duty gives the plaintiffs standing to seek its enforcement.
>
> *Id.* at 201 (footnote omitted).

It appears contradictory, and perhaps punitive, that the applications of 18 U.S.C. § 3332(a) and *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973) can be so straightforward in the Southern District of New York, yet be completely ignored when seeking the benefit of the identical statute, 18 U.S.C. § 3332(a), in the Northern District of Illinois or the Seventh Circuit Court of Appeals.

The sole function of the court is to enforce the law according to the statute. *Caminetti v. United States*, 242 U.S. 470, 485, 37 S.Ct. 192, 194 (1917).

The goal of statutory interpretation is to implement congressional intent. *Cabell Huntington Hosp., Inc. v. Shalala*, 101 F.3d 984, 986 (4th Cir. 1996).

Courts cannot judicially rewrite statutes. *In re Espy*, 80 F.3d 501, 505 (D.C. Cir. 1996) quoting *Aptheker v. Secretary of State*, 84 S.Ct. 1659, 1668 (1964).

Policy considerations may not trump the plain language of the statute. *American Textile Mfrs. Institute v. The Limited*, 190 F.3d 729, 738-739 (6th Cir. 1999).

In the absence of legislative guidance, it is inappropriate for courts interpreting statutes to pick and choose based on the court's assessment of the relative importance

of the interests served. *Suter v. Munich Reinsurance Co.*, 223 F.3d 150, 160 (3d Cir. 2000) (citation omitted).

The Seventh Circuit Court of Appeals relied upon four cases as "precedent" to deny petitioner the relief he sought, *i.e.*, access to the federal grand jury to present his evidence, pursuant to Federal Rule of Criminal Procedure 6(a) and 18 U.S.C. § 3332(a).

Each case is addressed in turn.

> Appellants contend that under 18 U.S.C. § 3332(b) a District Court is empowered to impanel only two Special Grand Juries in a single district at any given time.
>
> *In re Korman*, 486 F.2d 926 (7th Cir. 1973) (footnote omitted).

It appears contradictory that the Seventh Circuit can quote a case that *addresses* 18 U.S.C. § 3332(b), then *ignores* 18 U.S.C. § 3332(a) as it applies to petitioner's case.

> Article II, Section 14 of the New Mexico Constitution states that "a grand jury shall be ordered to convene . . . upon the filing of a petition therefor signed by not less than the lesser of two hundred registered voters or five percent of the registered voters of the county." In this mandamus action we assumed original jurisdiction, N.M. Const. art. VI, § 3, to decide whether a district Judge enjoys discretionary authority to refuse to convene a grand jury requested by petition. We conclude a Judge is mandated to convene the grand jury or otherwise substantially comply with the request.
>
> *Cook v. Smith*, 834 P.2d 418, 114 N.M. 41, 53 (1992).

It appears contradictory that the Seventh Circuit would address a *state* constitutional provision and *ignores* a federal statute, simultaneously.

> The Constitution's requirements are as applicable to the police when they choose sides in a

> dispute among citizens as when they seize evidence for use in criminal prosecutions. *See, e.g., Soldal v. Cook County*, 506 U.S. 56 (1992); *Guzell v. Hiller*, 223 F.3d 518 (7th Cir. 2000).
>
> *Johnson v. City of Evanston*, 250 F.3d 560 (7th Cir. 2001).

Apparently this principle does not apply to judges and prosecutors who "choose sides" in order to protect corrupt state court judges and a law firm engaged in criminal violations of federal law.

Finally, there is the application (or, more correctly, misapplication) of *Linda R.S. v. Richard D., supra*.

Petitioner did not demand a *prosecution*; he requested *access* to a federal grand jury, pursuant to Federal Rule of Criminal Procedure 6(a) and/or 18 U.S.C. § 3332(a), to report criminal acts. To stand this argument on its head, even the United States Attorney cannot *demand* a prosecution. If the grand jury refuses to indict, that is the end of it.

Linda R.S. was, simply put, wrongly decided.

> Article 602, in relevant part, provides: "any parent who shall willfully desert, neglect or refuse to provide for the support and maintenance of his or her child or children under eighteen years of age, shall be guilty of a misdemeanor, and upon conviction, shall be punished by confinement in the County Jail for not more than two years." The Texas courts have consistently construed this statute to apply solely to the parents of legitimate children and to impose no duty of support on the parents of illegitimate children. *See Home of the Holy Infancy v. Kaska*, 397 S.W.2d 208, 210 (Tex. 1966); *Beaver v. State*, 96 Tex. Cr. R. 179, 256 S.W. 929 (1923). In her complaint, appellant alleges that one Richard D. is the father of her child, that Richard D. has refused to provide support for the child, and that although appellant made application to the local district

> attorney for enforcement of Art. 602 against Richard D., the district attorney refused to take action for the express reason that, in his view, the fathers of illegitimate children were not within the scope of Art. 602.
>
> Appellant argues that this interpretation of Art. 602 discriminates between legitimate and illegitimate children without rational foundation and therefore violates the Equal Protection Clause of the Fourteenth Amendment. *Cf. Gomez v. Perez*, 409 U.S. 535 (1973); *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972); *Glona v. American Guarantee & Liability Ins. Co.*, 391 U.S. 73 (1968); *Levy v. Louisiana*, 391 U.S. 68 (1968). But *cf. Labine v. Vincent*, 401 U.S. 532 (1971).
>
> *Linda R.S. v. Richard D.*, *supra*, 410 U.S. at 615-616 (footnote omitted).

Linda R.S. violates the Equal Protection Clause. This was *not* one of this Court's more sentient decisions, in that it abandoned *children* who, through no fault of their own, were not sanctioned by the state.

> To be sure, appellant no doubt suffered an injury stemming from the failure of her child's father to contribute support payments. But the bare existence of an abstract injury meets only the first half of the standing requirement. "The party who invokes [judicial] power must be able to show . . . that he has sustained or is immediately in danger of sustaining some direct injury as the result of [a statute's] enforcement." *Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923).
>
> *Id.* at 618.

Denial of food, clothing, and shelter is hardly an abstract injury.

> The Court's prior decisions consistently hold that a citizen lacks standing to contest the policies of

> the prosecuting authority when he himself is neither prosecuted nor threatened with prosecution. *See Younger v. Harris*, 401 U.S. 37, 42 (1971); *Bailey v. Patterson*, 369 U.S. 31, 33 (1962); *Poe v. Ullman*, 367 U.S. 497, 501 (1961). Although these cases arose in a somewhat different context, they demonstrate that, in American jurisprudence at least, a private citizen lacks a judicially cognizable interest in the prosecution or non-prosecution of another.

Id. at 619.

A prosecution is not an investigation.

Between 1701 and at least June 30, 1906, a private citizen had a judicially cognizable interest in the prosecution of another, as petitioner has demonstrated.

The dissenters in this 5-4 decision appeared willing to ignore status quo and consider the effect of the practice.

> Appellant, her daughter, and the children born out of wedlock whom she is attempting to represent have all allegedly been excluded intentionally from the class of persons protected by a particular criminal law. They do not get the protection of the laws that other women and children get. Under Art. 602, they are rendered nonpersons; a father may ignore them with full knowledge that he will be subjected to no penal sanctions. The Court states that the actual coercive effect of those sanctions on Richard D. or others "can, at best, be termed only speculative." This is a very odd statement. I had always thought our civilization has assumed that the threat of penal sanctions had something more than a "speculative" effect on a person's conduct. This Court has long acted on that assumption in demanding that criminal laws be plainly and explicitly worded so that people will know what they mean and be in a position to conform their

> conduct to the mandates of law. Certainly Texas does not share the Court's surprisingly novel view. It assumes that criminal sanctions are useful in coercing fathers to fulfill their support obligations to their legitimate children.
>
> Unquestionably, Texas prosecutes fathers of legitimate children on the complaint of the mother asserting nonsupport and refuses to entertain like complaints from a mother of an illegitimate child. I see no basis for saying that the latter mother has no standing to demand that the discrimination be ended, one way or the other.
>
> If a State were to pass a law that made only the murder of a white person a crime, I would think that Negroes as a class would have sufficient interest to seek a declaration that that law invidiously discriminated against them. Appellant and her class have no less interest in challenging their exclusion from what their own State perceives as being the beneficial protections that flow from the existence and enforcement of a criminal child-support law.
>
> I would hold that appellant has standing to maintain this suit and would, accordingly, reverse the judgment and remand the case for further proceedings.
>
> *Id.* at 620-622.

Fortunately for children born out of wedlock, almost all states in the Union have enacted laws nullifying this decision.

Unfortunately, the proposition that a "private citizen lacks standing to demand the prosecution of another" has been interpreted by our courts to mean that citizens who have been damaged by the crimes of others, shall have no opportunity to present their evidence, except at the will of a judge or a prosecutor. It goes without saying that judges and prosecutors can have interests that conflict with the

interests of the damaged party. Therefore, a citizen's right to assert his rights is fettered; it becomes a gift to be dispensed in conformity with the interests of the giver. The common law is lost.

> Respondent filed this suit under 42 U. S. C. §1983 alleging that petitioner violated the Fourteenth Amendment's Due Process Clause when its police officers, acting pursuant to official policy or custom, failed to respond to her repeated reports over several hours that her estranged husband had taken their three children in violation of her restraining order against him. Ultimately, the husband murdered the children. The District Court granted the town's motion to dismiss, but an en banc majority of the Tenth Circuit reversed, finding that respondent had alleged a cognizable procedural due process claim because a Colorado statute established the state legislature's clear intent to require police to enforce restraining orders, and thus its intent that the order's recipient have an entitlement to its enforcement. The court therefore ruled, among other things, that respondent had a protected property interest in the enforcement of her restraining order.
>
> Held: Respondent did not, for Due Process Clause purposes, have a property interest in police enforcement of the restraining order against her husband. Pp. 6-19.
>
> *Town of Castle Rock, Colorado v. Gonzales*, 125 S.Ct. 2796 (2005).
>
> In other contexts, we have explained that "a private citizen lacks a judicially cognizable interest in the prosecution or non-prosecution of another." *Linda R. S. v. Richard D.*, 410 U.S. 614, 619 (1973).
>
> *Id.* at n. 13.

One must wonder whether, had this incident happened to a citizen of influence as opposed to a citizen with

none, the question would have risen to this Court or if so, what this Court's decision would have been.

> These sworn statements, as the District Court determined, adequately documented injury in fact. We have held that environmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons "for whom the aesthetic and recreational values of the area will be lessened" by the challenged activity. *Sierra Club v. Morton*, 405 U.S. 727, 735 (1972). *See also Defenders of Wildlife*, 504 U.S., at 562-563 ("Of course, the desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purposes of standing.").
>
> *Friends of Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000).

Birdwatchers have standing but mothers of murdered children do not.

> Petitioners, state correctional officials, seek review of a decision of the United States Court of Appeals for the Fourth Circuit finding petitioners in violation of 42 U.S.C. § 1983 for opposing respondents' application for an arrest warrant. We grant the motion of respondents for leave to proceed *in forma pauperis* and the petition for writ of *certiorari* and reverse on the basis of our decision in *Linda R. S. v. Richard D.*, 410 U.S. 614 (1973).
>
> Respondents were prison inmates in the Central Correctional Institution in Columbia, S. C., at the time of a prison uprising in August 1973. Respondents contend that during the uprising they were unnecessarily beaten by prison guards. Respondent Timmerman sought criminal arrest warrants against four prison guards. In support of his action, Timmerman presented sworn statements to

a Magistrate along with alleged "confidential information" from an employee at the prison who purportedly investigated the incident and concluded that respondents were victimized by the prison guards. Although a subsequent hearing in the Federal District Court indicated that the information provided by Timmerman was "suspect at best," it provided sufficient evidence to convince the state-court Magistrate that probable cause existed for issuance of arrest warrants against the prison guards. The Magistrate informed the legal adviser to the South Carolina Department of Corrections of his intent to issue the warrants and the legal adviser relayed this information to the prison Warden.

In an effort to have the criminal action against the correctional officers dropped, the legal adviser and Warden met with the County Sheriff, Deputy Attorney, and State Solicitor. At the meeting, the State Solicitor reviewed the facts and stated that there would be no indictment against three of the accused guards, but that he was unsure whether an indictment would be sought against the fourth guard. As a result of the meeting, the State Solicitor wrote a letter to the Magistrate requesting that the warrants not be issued. The Solicitor also stated that he intended to ask the State Law Enforcement Division to conduct an investigation concerning the charges made against the officers involved; the Magistrate did not issue the warrants and no state investigation was initiated.

Respondents subsequently filed suit in the United States District Court for the District of South Carolina contending, among other claims, that petitioners conspired in bad faith to block the issuance of the arrest warrants for the prosecution of the prison guards. The District Court concluded that

> petitioners denied respondents their right to "a meaningful ability to set in motion the governmental machinery because [petitioners' activities] stopped the machinery unlawfully, not in a proper way, as for example, upon a valid determination of lack of probable cause." Although the State Solicitor and the Magistrate were found to be immune from damages, the District Court concluded that the legal adviser to the prisons and the Director of the Department of Corrections were liable for their actions in requesting the State Solicitor to discourage issuance of the warrants. Respondents were awarded $3,000 in compensatory damages, $1,000 in punitive damages and attorney's fees against the two petitioners.
>
> The United States Court of Appeals for the Fourth Circuit affirmed and acknowledged that under *Linda R. S. v. Richard D., supra*, at 619, "a private citizen lacks a judicially cognizable interest in the prosecution or non-prosecution of another." The Court of Appeals concluded, however, that *Linda R. S.* did not foreclose respondents' right to seek an arrest warrant.
>
> *Leeke v. Timmerman*, 454 U.S. 83, 84-86, 102 S.Ct. 69 (1981) (footnote omitted).

This case conspicuously failed to address the following:

Whites comprise 67.2% of South Carolina's general population and blacks comprise 29.5%.

The population of South Carolina prisons is exactly opposite. Of those incarcerated, blacks comprise 67% and whites comprise 31%.

I.e., the "Rodney King treatment" perpetrated on prison inmates, most of whom were black, was apparently looked on with approval by eight upper class whites and one black (Thurgood Marshall) who spent most of his time on the U.S. Supreme Court authoring dissenting opinions.

Control of the grand jury by government attorneys and lower court judges can be corrected even without a grant of certiorari by this Court.

Congress has the authority to overrule wrongly decided cases. *Wesson v. United States*, 48 F.3d 894, 901 (5th Cir. 1995).

Congress . . . may cure any error made by the courts. *Fast v. School Dist. of City of Ladue*, 728 F.2d 1030, 1034 (8th Cir. 1984) (en banc).

Congress has the power to counter judicial doctrine. *Belgard v. State of Hawaii*, 883 F.Supp. 510, 514 (D. Hawaii 1995).

It should not be necessary for Congress to visit this issue.

CONCLUSION

Petitioner's question tests the application of checks and balances. It asks this Court to settle the intent of Congress in 18 U.S.C. § 3332(a) and to determine whether the "public interest" in Federal Rule of Criminal Procedure 6(a) should be excepted by those against whom it is invoked.

Did Congress intend that the subjects of inquiry be the gatekeepers of inquiry and if so, would this sanction a conflict of interest against the public interest?

For the reason set forth above, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 8, 2006

2006 WL 287433

UNPUBLISHED ORDER
Not to be cited per Circuit Rule 53

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Submitted February 1, 2006*
Decided February 7, 2006

Before

Hon. RICHARD A. POSNER, *Circuit Judge*

Hon. KENNETH F. RIPPLE, *Circuit Judge*

Hon. DANIEL A. MANION, *Circuit Judge*

No. 05-2833

MICHAEL L. KATHREIN, *Plaintiff-Appellant*,	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
v.	
BRIGID MCGRATH, et al.,	No. 04 C 7324
Defendants-Appellees.	David H. Coar, *Judge.*

* After examining the briefs and records, we have concluded that oral argument is unnecessary. Thus, these appeals are submitted on the briefs and records. *See* Fed. R.App. P. 34(a)(2).

Nos. 05-2907 & 05-3523

MICHAEL L. KATHREIN,

Plaintiff-Appellant,

v.

R.J. SIEGEL,

Defendant-Appellee.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division

No. 1:05-cv-01718
Milton I. Shadur,
Judge.

ORDER

These consolidated appeals arise out of a dispute that moved from cyberspace to the courts of Illinois and finally landed in federal court.[1] Michael Kathrein created an internet website known as "michaelmonar.com." Outraged at the website's content, Michael Monar sued Kathrein in the Circuit Court of Cook County. To put the dispute in context, Monar is married to Kathrein's ex-wife, and in the midst of a contentious divorce and child-custody dispute among Kathrein, Monar, and Kathrein's ex-wife, Monar discovered the existence of michaelmonar.com. The website included sexual and pornographic depictions with references to Monar, and at times automatically redirected those who accessed it to other pornographic websites. Monar, who runs a consulting firm, had tried negotiating with Kathrein for rights to the domain name, but, having no luck, he brought his state lawsuit alleging that Kathrein had injured his business and reputation.

During that litigation the state court enjoined Kathrein from posting pornographic material on michaelmonar.com

[1] In an order dated August 31, 2005, we consolidated nos. 05-2907 and 05-3523 for purposes of briefing and disposition. We have also consolidated no. 05-2833 for decision.

or creating redirections to other pornographic websites. Monar later suspected that, despite this injunction, Kathrein had added another redirection of michaelmonar.com to a pornographic search engine, and in April 2004 he filed a motion seeking to hold Kathrein in contempt for violating the injunction. Kathrein responded that, indeed, he had inserted a command that would redirect users of michaelmonar.com, but he defended his action with the explanation that the programmed redirection would occur only after an extremely long delay, some three hundred billion seconds. Monar, skeptical that there was such a delay feature, then sought and received an order permitting immediate inspection of Kathrein's computer by a forensic computer expert.

The expert Monar retained is R.J. Siegel, the defendant in one of the federal actions underlying these appeals. Pursuant to the state court's order, Siegel examined the computer Kathrein produced but concluded that it was not the one used as the server for the website. Kathrein then admitted switching computers and claimed that he left the old computer outside his office and did not know who took it. Both parties then moved for sanctions; Kathrein asserted that Siegel violated the court's order by examining, altering, and copying data from his computer that was beyond the scope of the order, while Monar sought to recover the expense of hiring Siegel to inspect what turned out to be the wrong computer.

These cross-motions for sanctions were still pending when Kathrein filed his first action in federal court. In that suit under 42 U.S.C. § 1983, which was filed in 2004 and assigned to Judge Coar, Kathrein claimed that Monar, his attorneys, and the judge assigned to Monar's lawsuit in state court were conspiring to deprive him of federally

protected rights by assuring that he did not get a fair trial in that ongoing action. That contention prompted the state-court judge, Brigid McGrath, to recuse herself, and Monar's lawsuit against Kathrein was then reassigned to another judge, Paddy McNamara. Judge McNamara considered the cross-motions for sanctions in December 2004. The court denied Kathrein's motion that same month but in March 2005, after seeking clarification of Siegel's fee, granted Monar's motion and awarded him $10,288 to cover the expense of the expert's wasted investigation. Meanwhile, Judge McNamara in January 2005 also conducted a hearing on, and granted, Monar's motion to hold Kathrein in contempt for violating the injunction against redirecting users of michaelmonar.com to another website.

Kathrein's response to these rulings was swift. Seven days after being held in contempt, he amended the federal action pending before Judge Coar to include Judge McNamara as a defendant. Then in March, after he was ordered to reimburse Monar for Siegel's fee, Kathrein filed a second federal lawsuit, this one assigned to Judge Shadur. Kathrein principally claimed that Siegel, the lone defendant, had fraudulently inflated his bill to Monar, and he demanded that the court grant him access to a federal grand jury so that he could present evidence of Siegel's alleged "mail fraud." *See* 18 U.S.C. § 1341. Kathrein further claimed that Siegel had violated two federal statutes, the Computer Fraud and Abuse Act, 18 U.S.C. §§ 1001-1038, and the Stored Communications Act, id. §§ 2701-2712, by inspecting and copying files on Kathrein's computer that were outside the scope of the state court's authorization. In addition to filing this federal lawsuit, Kathrein also took an immediate appeal of the sanctions

order, which as far as we can tell, is still pending in the Illinois appellate court. Likewise, it appears that Monar's state lawsuit against Kathrein remains unresolved.

The two federal lawsuits, however, have been dismissed. In the first, Kathrein recognized that the two state-court judges were absolutely immune, but he sought damages against Monar and his lawyers. And, just as he did in the federal action against Siegel, Kathrein also sought access to a federal grand jury to investigate possible criminal conduct by all of the defendants, including the judges. In their motion to dismiss, the defendants asked Judge Coar to abstain under *Younger v. Harris*, 401 U.S. 37 (1971). The court, reasoning that *Younger* did not apply but that "the doctrine of comity" underlying that decision did, dismissed the action. The court also explained that Kathrein's request for a grand jury investigation should be directed to the United States attorney, not the court. Kathrein filed an appeal, which we docketed as case no. 05-2833.

As for the second federal suit, Siegel characterized the action as a disguised appeal of the sanctions awarded in state court and urged that it be dismissed under the *Rooker-Feldman* doctrine. *See Rooker v. Fid. Trust Co.*, 263 U.S. 413 (1923); *D.C. Court of Appeals v. Feldman*, 460 U.S. 462 (1983). Judge Shadur initially questioned whether *Rooker-Feldman* applied in light of the Supreme Court's decision in *Exxon Mobil v. Saudi Basic Industries Corporation*, 125 S.Ct. 1517 (2005), but eventually satisfied himself that it did and granted Siegel's motion to dismiss for lack of jurisdiction. We have docketed Kathrein's appeal of that dismissal as case no. 05-2907. The district court also ordered Kathrein to pay $20,228 to Siegel for his attorneys' fees in defending a frivolous

lawsuit as a sanction under Federal Rule of Civil Procedure 11, and we have docketed Kathrein's appeal of that order as case no. 05-3523.

We start with Judge Shadur's dismissal of the suit against Siegel and related award of Rule 11 sanctions. Kathrein contends that the district court (1) was prejudiced against him and thus denied him a fair hearing; (2) misapplied *Rooker-Feldman*; (3) erred in refusing to order a grand jury investigation of Siegel for mail fraud; and (4) abused its discretion in sanctioning him under Rule 11.

As evidence that Judge Shadur was prejudiced against him, Kathrein relates comments allegedly made to him by two unknown attorneys who happened to be leaving Judge Shadur's courtroom as Kathrein entered for the first time. He was told, he says, that the judge "predetermines cases" before hearing them. Kathrein also points to Judge Shadur's later observation that Kathrein may be a "wise guy" and that his conduct in suing the state judges (in the lawsuit before Judge Coar) was "unpardonable." Siegel argues, however, that Kathrein has waived any argument about the district court's purported bias because he failed to raise the issue in the district court. We agree.

Parties who believe that the judge assigned to their case is not impartial, *see* 28 U.S.C. § 455(a), must raise the concern to the district court first. *See United States v. Ruzzano*, 247 F.3d 688, 694 (7th Cir. 2001); *United States v. Mathison*, 157 F.3d 541, 545-46 (8th Cir. 1998); *Green v. Branson*, 108 F.3d 1296, 1305 (10th Cir. 1997) (applying rule in civil case). Kathrein never did. Even though he later petitioned this court for a writ of mandamus seeking Judge Shadur's removal from his case – albeit nearly three months after the judge had granted the defendant's motion

to dismiss – it is Kathrein's failure to raise the issue before the district court that dooms his argument. *See Ruzzano*, 247 F.3d at 694. And although we have acknowledged the possibility that litigants may excuse their failure to raise recusal issues in the district court by showing that the bias was undiscoverable until the proceedings had ended, Kathrein offers no such excuse. *See United States v. Ward*, 211 F.3d 356, 364 (7th Cir. 2000) (expressing doubt that criminal defendant waived argument concerning the trial judge's alleged bias by failing to seek recusal before sentencing, since defendant did not learn of asserted basis for recusal until after trial); *Ruzzano*, 247 F.3d at 694 (recognizing that "extraordinary circumstances" might excuse failure to seek refusal in timely manner). In fact, Kathrein would have no such excuse because most of the "incidents of bias" that he complains about happened before the dismissal of his complaint, or at least before Judge Shadur awarded sanctions. In any event, we are not convinced that Judge Shadur's comments or the speculation of attorneys about a particular judge's methodology establish the "deep-seated favoritism or antagonism" that would constitute judicial bias. *See Liteky v. United States*, 510 U.S. 540, 555 (1994); *Grove Fresh Distribs., Inc. v. John Labatt, Ltd.*, 299 F.3d 635, 640 (7th Cir. 2002); *In re Huntington Commons Assocs.*, 21 F.3d 157, 158-59 (7th Cir. 1994).

Kathrein is correct, however, that Judge Shadur erred in dismissing the suit against Siegel under *Rooker-Feldman*. That doctrine applies only where a litigant seeks to overturn a state-court judgment, and Kathrein does not seek to do so. The district court saw Kathrein's claim that Siegel engaged in fraudulent billing as an attempt to overturn the state-court's imposition of sanctions, and his

claims under the Computer Fraud and Abuse Act and Stored Communications Act as an attempt to overturn the denial of Kathrein's motion to sanction Siegel for exceeding the scope of his search authorization. But we have recognized the difference between a claim that seeks to overturn a state judgment directly and one that is independent because it alleges a prior injury that a state court failed to remedy. *Taylor v. Fed. Nat. Mortg. Ass'n*, 374 F.3d 529, 533 (7th Cir. 2004); *Brokaw v. Weaver*, 305 F.3d 660, 664-65 (7th Cir. 2002); *Long v. Shorebank Dev. Corp.*, 182 F.3d 548, 555 (7th Cir. 1999). And Kathrein's claim that Siegel drafted a fraudulent bill fits into the latter category because the bill was totaled before the state court relied on it in calculating an appropriate sanction. Likewise, Kathrein's claims that Siegel violated federal statutes by performing an inspection beyond the scope of his authority alleges injuries that occurred, if at all, prior to the state court's denial of Kathrein's motion for sanctions against Siegel. Thus, while a judgment in federal court for Kathrein on these claims might undermine the state court's rulings on the cross-motions for sanctions, *Rooker-Feldman* is nevertheless inapplicable. *See GASH Assocs. v. Village of Rosemont*, 995 F.2d 726, 728 (7th Cir. 1993) (recognizing that federal jurisdiction exists even over an independent claim that incidentally denies a legal conclusion that a state court has reached).

Moreover, even if we could say that Kathrein truly seeks to overturn state-court rulings, we still doubt that dismissal under *Rooker-Feldman* would be appropriate because the state-court proceedings have not ended. In *Exxon Mobil*, the Supreme Court limited *Rooker-Feldman* to situations where the losing party in state court files suit in federal court after "state proceedings [have] ended." 125

S.Ct. at 1521-22, 1526. One circuit has interpreted *Exxon Mobil* to mean that state proceedings will have "ended" when the highest court capable of review has considered the state decision, or where no party to the case seeks further action. *See Federacion de Maestros de Puerto Rico v. Junta de Relaciones del Trabajo de Puerto Rico*, 410 F.3d 17, 24 (1st Cir. 2005). Under that logic, it is too early in the state proceedings for the district court to have dismissed under *Rooker-Feldman* because Kathrein's appeal of the sanctions order was pending at the time he commenced his federal suit and the order denying Kathrein's motion for sanctions against Siegel was not severed from the case for immediate appeal and cannot be appealed until the underlying case is complete.

Still, while we disagree with the district court's application of the *Rooker-Feldman* doctrine, we conclude that dismissal was the correct outcome. To the extent his federal suit concerns Siegel's bill to Monar, Kathrein cannot maintain a claim for fraudulent billing against Siegel under Illinois law because he lacks standing to challenge the amount of a bill between Siegel and his client. (Kathrein and Siegel are from different states, and while it appears unlikely that the $75,000 threshold could be met, *see* 28 U.S.C. § 1332(a), we assume that it is.) Under Illinois law, a cause of action based on contract may be brought only by a party to that contract, someone in privity with a party, or a third-party beneficiary. *Kaplan v. Shure Bros., Inc.*, 153 F.3d 413, 418 & n. 3 (7th Cir. 1998) (applying Illinois law). The state court's order directing Kathrein to pay Monar the amount of Siegel's fees made Kathrein none of these. The state court simply used the amount of Siegel's fees as a reference in determining what value to place on the costs of Kathrein's obfuscatory

litigation tactics. Moreover, though Kathrein frequently has invoked the federal mail fraud statute in this litigation, *see* 18 U.S.C. § 1341, there is no private right of action under that criminal provision. *See Wisdom v. First Midwest Bank, of Poplar Bluff*, 167 F.3d 402, 408 (8th Cir. 1999) (joining Fifth and Sixth Circuits in finding no private cause of action for mail fraud). Finally, despite the lengthy discussions in his brief about his claim of fraud and the purported need for a grand jury investigation, Kathrein nowhere disputes Siegel's argument that he fails to state a claim under either the Computer Fraud and Abuse Act or the Stored Communications Act.[2] We thus uphold the dismissal on the ground that Kathrein failed to state a claim, and for that reason modify the judgment to reflect that the dismissal is with prejudice. *See Ciarpaglini v. Saini*, 352 F.3d 328, 331 (7th Cir. 2003) (explaining that we may affirm district court's dismissal on any adequate ground found in record).

Kathrein, then, is left with an argument that the district court's sanction in the amount of $20,338 was inappropriate. In light of our conclusion that *Rooker-Feldman* does not

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[2] The Computer Fraud and Abuse Act provides a civil remedy for one who suffers damage by reason of a violation of the Act. 18 U.S.C. § 1030(g). A violation can occur, however, only where there is damage to a "protected computer." *Id.* § 1030(a)(5)(A)(i). A protected computer is one used exclusively by a financial institution or the United States, or that is used in interstate commerce. *Id.* § 1030(e)(2). The Stored Communications Act also provides a civil remedy, but a violation occurs only as a consequence of accessing a "facility through which an electronic communication service is provided." *Id.* § 2701(a). An "electronic communication service" is one that provides the ability to send or receive signals that affect interstate commerce. *Id.* § 2510(15), (12); see 18 U.S.C. § 2711 (making definitions in § 2510 applicable to the Stored Communications Act).

apply, and respecting the district court's role in determining Rule 11 sanctions in the first instance, *see Johnson v. Cherry*, 422 F.3d 540, 553 (7th Cir. 2005), we vacate and remand the sanctions award for the district court to determine whether sanctions are warranted for Kathrein's filing of a complaint that fails to state a claim.

Before leaving Kathrein's suit against Siegel, we address an argument he makes both here and in his appeal from the dismissal of his other federal complaint. In both federal actions Kathrein sought and was denied an order compelling a federal grand jury to investigate alleged crimes committed by the various defendants. In challenging those denials, Kathrein persists with his frivolous contention that he is entitled to appear before a grand jury to present his allegations. *See Korman v. United States*, 486 F.2d 926, 933 (7th Cir. 1973) (holding that authority to convene federal grand jury is vested in district court); *cf. Cook v. Smith*, 834 P.2d 418, 420-21 (N.M. 1992) (recognizing New Mexico's procedure permitting citizens to petition for convening a grand jury as rare). Kathrein admits that the goal of his proposed investigation is to lead to the prosecution of the individuals that he has sued, but a private citizen lacks standing to demand the prosecution of another. *See Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973); *Johnson v. City of Evanston, Ill.*, 250 F.3d 560, 563 (7th Cir. 2001).

This brings us to Kathrein's action under § 1983 against Monar, his lawyers, and the two state judges. In his opening brief Kathrein asserts that Judge Coar, by dismissing the complaint, deprived him of his Seventh Amendment right to a jury trial. His brief, however, includes nothing more than a short history of the amendment and does not address the reason given by the district

court for the dismissal. The defendants accordingly contend that Kathrein has waived any challenge to the dismissal, although they also go on to diligently anticipate and respond to arguments that Kathrein might have made but did not. In his reply brief Kathrein finally addresses the points the defendants flagged for him (his reply brief is more than twice the length of his opening brief), but this comes too late. *See Hess v. Reg-Ellen Mach. Tool Corp.*, 423 F.3d 653, 665 (7th Cir. 2005) (holding that issues raised for first time in reply briefs are waived). We thus affirm the dismissal. *See Landstrom v. Ill. Dept. of Children and Family Servs.*, 892 F.2d 670, 678 (7th Cir. 1990) (noting that failure to challenge district court's holding waives claim of error in that ruling).

Accordingly, in case no. 05-2907 we MODIFY the dismissal to be with prejudice, and, as modified, AFFIRM the judgment of the district court. In case no. 05-3523 we VACATE the award of Rule 11 sanctions and REMAND for the district court to reconsider the propriety of sanctions in light of our conclusion that Kathrein's complaint against Siegel fails to state a claim. Finally, in case no. 05-2833 we AFFIRM the judgment dismissing Kathrein's complaint.

2006 WL 287433

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

MICHAEL LEE-KATHREIN	)	
Plaintiff,	)	
v.	)	**No. 04 C 7324**
BRIGID M. MCGRATH, MICHAEL P. MONAR, DANIEL V. KINSELLA, JEFFREY R. ROSENBERG, SCHUYLER, ROCHE & ZWIRNER, P.C., PADDY H. MCNAMARA	)	**HONORABLE DAVID H. COAR**
Defendants.	)	

MEMORANDUM OPINION AND ORDER

I. Background Facts

Plaintiff Michael Lee-Kathrein ("Lee-Kathrein" or "Plaintiff") filed a complaint on November 12, 2004, against Defendants Judge Brigid M. McGrath ("McGrath"), Michael Monar ("Monar"), Daniel V. Kinsella ("Kinsella"), Jeffrey R. Rosenberg ("Rosenberg"), and Schuyler, Roche & Zwirner, P.C. ("SRZ") (collectively "Defendants"). Plaintiff alleged that he was being deprived of equal protection, due process, property, and meaningful access to the courts via a conspiracy engaged between the defendants. On January 10, 2005, Plaintiff filed a First Amended Complaint, adding Judge Paddy H. McNamara as an additional named defendant. First Am. Compl. The complaint arises from alleged violations of Plaintiff's civil rights in relation

to an ongoing lawsuit in the Law Division of the Circuit Court of Cook County, Illinois (case number 03 CH 18899), over which Judge McGrath is presiding. Defendant Monar is the plaintiff in the state court case and defendants Kinsella and Rosenberg, along with their law firm, defendant SRZ, represent him. Plaintiff alleges that the defendants have conspired to "milk" the litigation when its sole purpose is to deprive him of his time and money and violate his rights to due process, equal protection, and meaningful access to the courts. Plaintiff contends that Judge McGrath "knows that case 03 CH 18899 has been brought by Monar as a harassment of Lee, and as a continuation and an extension of a divorce case" involving Lee-Kathrein and his former wife, who is presently married to Monar. In addition, Plaintiff contends that Judge McGrath displayed bias against him and violated his civil rights during a Rule to Show Cause hearing in Case Number 03 CH 18899. He further alleges that Judge McNamara, "through rulings in her court that have no basis in law or fact," is retaliating against Plaintiff because he has brought the instant lawsuit against Judge McGrath.[1]

This matter comes before the court on defendants' motions to dismiss pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6).

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[1] The pleadings do not specify what role Judge McNamara plays in the state court proceedings nor when she became involved. It appears, although again it is not specified, that there are or have been multiple state court proceedings between Plaintiff and defendant Monar, among others, in the Illinois state courts.

II. Legal Standard

In reviewing a motion to dismiss for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1), the district court must accept all well-pleaded factual allegations as true and draw all reasonable inferences in favor of the plaintiff. *See Transit Exp. Inc. v. Ettinger,* 246 F.3d 1018, 1023 (7th Cir. 2001). On a motion to dismiss under Rule 12(b)(1), the plaintiff bears the burden of establishing that the jurisdictional requirements have been met. *Kontos v. Dep't of Labor,* 826 F.2d 573, 576 (7th Cir. 1987). When a party moves for dismissal under Rule 12(b)(1), the nonmoving party must provide competent proof of jurisdictional facts to support its allegations. *Thomason v. Gaskill,* 315 U.S. 442, 446 (1942); *Kontos,* 826 F.2d at 576.

On a motion to dismiss for failure to state a claim, the Court again accepts all well-pleaded allegations in the plaintiff's Complaint as true. Fed. R. Civ. P. 12(b)(6). The purpose of a 12(b)(6) motion is to decide the adequacy of the complaint, not to determine the merits of the case. *Gibson v. City of Chicago,* 910 F.2d 1510, 1520 (7th Cir. 1990) (citation omitted). A complaint should not be dismissed "unless it appears beyond all doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957).

III. Analysis

Defendants Monar, Kinsella, Rosenberg, and SRZ contend that this court is precluded from exercising subject matter jurisdiction over the instant litigation because of the *Rooker-Feldman* doctrine. *District of*

Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983); *Rooker v. Fidelity Trust Co.,* 263 U.S. 413 (1923). They contend that the *Rooker-Feldman* doctrine and its Seventh Circuit progeny, *Schmitt v. Schmitt,* 324 F.3d 484 (7th Cir. 2003), and *Wright v. Tackett,* 39 F.3d 155 (7th Cir. 1994), completely preclude this court from exercising jurisdiction over any of the claims raised in Plaintiff's First Amended Complaint.

The United States Supreme Court recently addressed the boundaries and applicability of the *Rooker-Feldman* doctrine in *Exxon Mobil Corporation v. Saudi Basic Industries Corporation,* ___ U.S. ___, 125 S. Ct. 1517, 161 L. Ed.2d 454 (2005). The Court held that the *Rooker-Feldman* doctrine is confined to "cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." *Id.* at 1521-22. The Court clearly delineated the limited circumstances in which its appellate jurisdiction over state-court judgments, 28 U.S.C. § 1257, precludes a United States district court from exercising otherwise authorized subject matter jurisdiction. *See, e.g.,* 28 U.S.C. §§ 1330-32. In the case at bar, the state court proceeding has not yet achieved final judgment. Under the reasoning set forth in *Exxon Mobil,* therefore, the *Rooker-Feldman* doctrine does not apply.

This case is a federal lawsuit related to events in ongoing state litigation. In *Exxon Mobil,* the Supreme Court noted that it had "repeatedly held that 'the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction.'" *Exxon Mobil,* 125 S. Ct. at 1526-27 (quoting *McClellan v. Carland,* 217 U.S. 268, 282 (1910)). The

federal court must determine, however, if it does have jurisdiction. Such a determination requires careful consideration of comity and abstention doctrines requiring the federal court to stay or dismiss the federal action in favor of the state-court litigation. *See, e.g., Colorado River Water Conservation Dist. v. United States,* 424 U.S. 800 (1976); *Younger v. Harris,* 401 U.S. 37 (1971); *Burford v. Sun Oil Co.,* 319 U.S. 315 (1943); *Railroad Comm'n of Tex. v. Pullman Co.,* 312 U.S. 496 (1941).

Defendants ask this court to refrain from acting pursuant to *Younger* abstention, but it is not clear that *Younger* is applicable in this situation. Plaintiff has not asked the federal court to enjoin the state court proceedings but rather has brought a separate, albeit closely related, action in federal court. To the extent that Plaintiff is implicitly asking this court to enjoin the state court proceedings, *Younger* abstention almost certainly would apply. Plaintiff states that the pending state court litigation is "a continuation and an extension of a divorce case." First Am. Compl., at ¶ 11. Plaintiff's former wife is currently married to defendant Monar. *Id.* Thus, the state court proceeding implicates family law, an area of traditional state regulation, and federal court abstention would be proper. *See Mansell v. Mansell,* 490 U.S. 581 (1989).

The public policy underlying *Younger,* however, is germane to this situation. Both the interests of comity and our system of federalism support the "longstanding public policy against federal court interference with state court proceedings." *Younger v. Harris,* 401 U.S. 37, 43 (1971). Under the doctrine of comity, a court with proper jurisdiction over a cause of action should nonetheless defer to a court of "another sovereignty with concurrent powers, and already cognizant of the litigation," until that court has

ruled upon the matter. *Rose v. Lundy,* 455 U.S. 509, 518 (1982). "Cooperation and comity, not competition and conflict, are essential to the federal design." *Ruhrgas, A.G. v. Marathon Oil Co.,* 526 U.S. 574, 576 (1999).

Plaintiff's complaint asks this court to convene a grand jury for the purpose of investigating alleged criminal acts in the state court proceeding. Plaintiff is correct that a federal district court can convene a grand jury; he misconstrues the procedure for doing so. The prosecutor, in this case the United States Attorney, is the party who requests a grand jury for alleged violations of federal law. *See, e.g.,* Douglas P. Currier, Note, *The Exercise of Supervisory Powers to Dismiss a Grand Jury Indictment – A Basis for Curbing Prosecutorial Misconduct,* 45 OHIO STATE L.J. 1077, 1079 (1984). The Justice Department is charged with enforcing federal criminal law. *See, e.g., United States v. Armstrong,* 517 U.S. 456, 464 (1996). An individual "lacks a judicially cognizable interest in the prosecution or nonprosecution of another." *Linda R.S. v. Richard D.,* 410 U.S. 614, 619 (1973).

Plaintiff has not demonstrated that he will not have an adequate opportunity to raise his constitutional challenges at the state court. *See Ohio Civil Rights Comm'n v. Dayton Christian School,* 477 U.S. 619 (1986); *Moore v. Sims,* 442 U.S. 415, 425 (1979). All of the allegations in Plaintiff's complaint stem from the pending state court proceeding in which he is a party. Plaintiff must dispute those proceedings in accordance with the proper procedures in state court, including state appellate review.

This court hereby dismisses Plaintiff's complaint in its entirety pursuant to the doctrine of comity and because

Plaintiff has failed to show that he cannot raise his claims and appeals in the state court system.

Conclusion

For the foregoing reasons, Defendants Motions to Dismiss are GRANTED. All other pending motions are moot and hereby terminated. This case is CLOSED.

Enter:

/s/ David H. Coar
David H. Coar
United States District Judge

Dated: **June 9, 2005**

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MICHAEL L. KATHREIN,	)	*DOCKET NO. 05 C 1718*
Plaintiff,	)	
	)	
vs.	)	
	)	
R. J. SIEGEL,	)	
	)	*Chicago, Illinois June 28,*
Defendant.	)	*2005 8:45 o'clock a.m.*

TRANSCRIPT OF PROCEEDINGS BEFORE THE HONORABLE MILTON I. SHADUR, Judge

APPEARANCES:

For the Plaintiff:

MR. MICHAEL LEE KATHREIN

For the Defendant:

MR. DANIEL V. KINSELLA

JESSE ANDREWS
Official Court Reporter – U. S. District Court
219 S. Dearborn Street
Chicago, Illinois 60604
(312) 435-6899

* * *

[2] THE CLERK: 05 C 1718, Kathrein vs. Siegel.

MR. KINSELLA: Good morning, your Honor. Daniel Kinsella for the defendant.

MR. KATHREIN: Good morning, your Honor. Michael Kathrein.

THE COURT: Good morning.

Let me begin by telling you I appreciate your coming in on short notice this way. I want to also add, as a kind of preliminary matter, that my practice when I refer to people in my written opinions is simply to use the last name, without "Mr." So no disrespect is intended to anybody when I am going to do that. Why don't you sit down while I tell you where I am coming from in connection with this as a result of what I have gotten here.

As you know, when you came before me on June 10th I identified a number of issues that seemed to me to require some further input from the parties. And as you know I set a schedule for submissions and then a July 7th status date. But what I have since been in receipt of, what's been tendered since then, has led me – as I indicated by having Sandy call you – to accelerate that status hearing, because I don't find that anything further is needed for ruling.

Before I turn to those submissions as they impact on the case directly, I should also tell you that I have given further consideration to that section of the Criminal Code that [3] I had called to your attention back on June 10th. My conclusion has been that the matter does deserve attention by the U.S. Attorney's Office. As Kathrein has shown himself to misunderstand, I think both in his lawsuit before Judge Coar and in this lawsuit, it's the prosecutor and not the judicial branch that makes that kind of prosecutorial decision. So I have sent to the United States Attorney this morning a letter that Sandy is going to deliver copies of to you following my ruling.

TO THE CLERK: Are there two of them here? I think there are three. One of them is mine.

THE CLERK: Okay. I am sorry.

THE COURT: Now as to this lawsuit, attorney Kinsella had said on June 10th as you know that there were additional documents, that were not then before me at that time, that would cast light on the jurisdictional issue that was posed by the Rooker-Feldman doctrine and the recent Exxon Mobil case that implicated the scope of that doctrine. Those additional documents have in fact been submitted, and I find that attorney Kinsella was correct. And that's the occasion for this earlier date.

What we have basically, as reflected by those documents, is that in the state court proceedings Kathrein made various contentions about Siegel's conduct that are now being advanced here. I looked at his filing back there that was [4] called his "Reply to Plaintiff's Second Emergency Motion for Compliance with Production of Intangible Things for Inspection and for Sanctions." And I am not going to read it at length. I am just going to read the captions of items II and III – Roman II and Roman III – because those tell us basically the scope. One of them says:

> *"Plaintiff's expert witness, Mr. R. J. Siegel has, with intention, violated this court's specific order limiting the scope of his interrogation."*

And of course "this court" is the state court. This was of course filed in the Circuit Court.

Point III is:

> *"Plaintiff's expert witness, Mr. R. J. Siegel has, with intention, violated this court's specific order by damaging defendant's intellectual property."*

And that was all part of what's labeled Defendant's Reply to Plaintiff's Second Emergency Motion for Compliance

with Production of Intangible things for Inspection and for Sanctions.

Indeed, Kathrein filed a counter-request for sanctions. On December 7th of last year judge McNamara, as part of her ruling – let me get that in front of me – said:

> *"Plaintiff's Second Motion for Compliance with Inspection of Tangible Things and for Sanctions is denied in part and granted in part. Further [5] inspection of Defendant's computer is denied.*

Plaintiff's motion for Sanctions is granted. And then it asks for a submission to quantify that. And then it went on to say:

> *"Defendant's request [now in that case Kathrein was defendant] – "Defendant's request for sanctions in response to Plaintiff's inspection of Defendant's computer is denied.*

Then on March 4th of this year Judge McNamara – let me get that one – entered an order that, after the quantification motion was submitted, said:

> *"Plaintiff's petition for costs is granted. Defendant shall pay to R. J. Siegel $10,288 within 30 days."*

And she found "there is no just reason to delay enforcement or appeal of this order," so that then became an appeallable order. And indeed on March 31st Kathrein filed his notice of appeal. And tl at notice of appeal said:

> *"This is an appeal of a final order in the cause docketed as number" so and so. "Petitioner appeals the final order of Judge Paddy H. McNamara, granting plaintiff's petition for costs for expert witness."*

Well, to address the motion to dismiss, it's necessary to examine the relationship between that present posture of the state court proceedings in the action that I [6] have just been referring to, that was brought by Michael Monar and Monar Consulting against defendant Kathrein. Those things seem to me to drive the conclusion. That is, let's assume for purposes of argument that Kathrein can prove, as he's asserting in this case, that Siegel exceeded the authority that was given to him in the state court proceedings. That's alleged in the Complaint here. If that were so, the rulings in the state case that I have just identified would be wrong. The award in the state case would be improper.

Indeed, I find that Kathrein himself has really basically recognized that. As I have now learned from his successful objection to the Monar motion to dismiss his notice of appeal in that case, filed in the Illinois Appellate Court, a motion that was captioned – let me get that one – "Defendant-Appellant's Objection to Plaintiff-Appelles' Motion To Dismiss Defendant's Notice of Appeal," what's disclosed there is that Kathrein had filed a motion in the circuit court to show cause why Siegel should not be held in contempt.

In paragraph 9 of that response he says:

> *"Indeed, the federal action against Siegel was made necessary largely because trial court Judge McNamara refused to hear Kathrein's Show Cause motion as to why, based on the same facts, Siegel should not be held in contempt."*

Notice how in that respect Kathrein described the [7] question for review in this pending appeal. Paragraph 18 says:

> *"Under the specific facts in [the case], was the awarding of plaintiffs' expert witness fees, ordered*

> *to be paid by Kathrein, legally available, proper, and with a view to substantial justice?*

Well, in an effort to separate what are really intertwined strains, despite the obvious fact that any success here in the federal court necessarily depends on a demonstration that would invalidate the award there in the state court, basically what we have is that Kathrein asserts I think two things.

First, he says that what he challenges there is whether he's properly required to pay Monar's costs of litigation, including that witness fee, not the conduct of Siegel in carrying out the activity.

Then he goes on to say in paragraph 12:

> *"Judge McNamara's decision in that proceeding, denying Kathrein's show cause hearing regarding the improprieties of R. J. Siegel, is not reviewable – (and he underscores "is not reviewable" at this time, nor will it . . . " [and he leaves out the word "be." It's intended to say, "Nor will it be the subject of this appeal."]*

But the attempted parsing in the first one – that is, to distinguish one of those things from the other – [8] provides I think a classic instance of what the common law has always barred under labels such as "splitting a cause of action" – in the federal court the proper term is "splitting a claim." And the second of those is at odds with the basic proposition that applies under Illinois law, as in federal law and in universal American jurisprudence. And that is that an 'appeal taken from an appealable order carries with it the ability to appeal all prior interlocutory orders that would not independently and alone be appealable because of their lack of finality.

Any quick look – for example, as to Illinois cases I had one of my law clerks do a very quick search. He turned up such cases for example as Weiss against Waterhouse Securities, which is an Illinois appellate decision from the First District in the year 2002. It's 335 Ill. App. 3d 875, 781 N.E. 2d 1105. And over at page 1110 of the N.E. Reporter it says:

> *"While an order denying a motion for dismissal is not a final and appealable determination but, rather is interlocutory in nature, we nonethelesss have jurisdiction to review the circuit court's denial .... because that motion was a necessary and attendant part ... of [whatever it was that was the final order]. Pursuant to case law [and this is the critical part], a non-appealable order may be [9] reviewed where it is subsumed in a final, appealable ruling [citing a whole flock of cases to that effect]."*

More briefly in another case, Habitat Company against McClure, which is another First District opinion, 301 Ill. App. 3d 425, 703 N.E. 2d 578, a 1998 decision, the court said very succinctly – let me get this one:

> *"Notices of appeal are liberally construed and an appeal from a subsequent final judgment draws in question all prior non-final rulings and fina' but non-appealable orders which produced the judgment."*

So what we have is I think what I will call, because Mr. Kathrein of course is a nonlawyer, but it's a mistaken view of the reviewability of the order that he's basically seeking to advance a collateral attack on.

Now what's done in an effort to advance the cause, but I think unsuccessfully, is arguing why, instead of pursuing

the thing in a state court where it belongs, he came to this federal court. Here is what's said in paragraphs 10 and 11:

> *"A federal action was taken because any independent suit filed in the circuit court against Siegel would almost certainly be consolidated to 03 CH 18899 (as was another case filed by defendant Kathrein's children against Monar alleging child abuse and conversiion* [sic] *of estate)."*
>
> *[10] "The likeliness of consolidation therefore, would effectively return the issue of Siegel's improprieties to Judge McNamara, who has shown presumptive and active bias against Kathrein, and who twice before, refused to consider or even read defendant's Show Cause Motion against Siegel."*

If that perception of Judge McNamara as biased under his conspiracy mindset, in which anybody who acts unfavorably, including judges, is a member of a wide-ranging conspiracy, a kind of warped perspective that I suppose could perhaps add me to the list after today, the state appellate courts are open to him in terms of the bias charged against Judge McNamara. Suspicion does not provide support for forum shopping.

Well, when we then cut through the underbrush, what I think has emerged plainly is that to prove that Siegel exceeded his authority necessarily means that the award for payment of his fees based on his examination was improper. And that's just another way of saying that the proceeding here amounts to a collateral attack on the payment order in the state court. And that's precisely what Exxon Mobil tells us Rooker-Feldman implicates, and that is that the federal court just doesn't have any jurisdiction to entertain it.

Now one final comment, I guess. Needless to say, I am not expressing any view as to what the situation might be if and when the state courts deal with finality with the order on [11] which the collateral attack is attempted here. So although I am granting the motion to dismiss, the dismissal is necessarily without prejudice to the possibility that a new federal action might perhaps be brought if the state court order were to be overturned in state court proceedings. Then what we might have, and I don't want to speculate on it, but that could present a different picture. So that by definition my decision that I have just announced deals with the action as I now have it, and based on all of the submissions that the parties have presented.

So for the the [sic] *reasons that I have stated, I am granting the motion to dismiss, and you are back in the state court where you belong. Any misunderstanding?*

Oh. Let me have – Sandy has got that letter for you to the United States Attorney.

MR. KINSELLA: Your Honor, for the record, we stated in our presentation that Mr. Kathrein had not paid the $10,299 –

THE COURT: My determination is not based on that, of course.

MR. KINSELLA: – when in fact it has been made, and I was not made aware of it. We admit that it was made. There is no contention as to that.

THE COURT: Okay. Thank you.

MR. KATHREIN: Your Honor, I would like to object, [12] just for the record, that I was not given proper

notice and opportunity to respond to his motion to dismiss. You bifurcated my response.

THE COURT: That's right. And I read your response. But the point you see was that the issue that I had earlier identified as expressing concern about depended on documents that really can't be controverted. You know you yourself have urged quite properly that the Court can take judicial notice of documents filed in the state court. And all I am doing essentially is basing this determination on the papers that you yourself have filed, that you yourself have characterized, and that you yourself have challenged. And I read your challenges, based on the notion that somehow you were foreclosed in the state court system from presenting the identical issues that you sought to present here. And that's what jurisdiction is about.

What our Court of Appeals tells us all the time, and properly, is that because federal courts are courts of limited jurisdiction, we have an obligation to review jurisdictional issues sua sponte. Even if parties have not raised them, the Court has a responsibility to determine that on its own, because federal courts – unlike the state court system in which there are courts of general jurisdiction, they can take any controversy that's he [sic] *presented to them – that's not true of the federal system. So I had already apprised you. Indeed, [13] you remember that I was the one who raised the question whether Rooker-Feldman applied, which was the position that had been taken, because I was concerned about whether it fit Exxon Mobil.*

But when the filings that you yourself had made demonstrate that, there really isn't any predicate for dealing with the thing differently. You can't unscramble the omelet.

MR. KATHREIN: Well, although true that may be, your Honor, it seems that I have been denied the opportunity to counter the arguments that are made by the defendant. And secondly, I suppose I would like to add that I do seek relief in this court that is not available [to] me in the state court, which is access to a grand jury under any circumstances.

THE COURT: Well, you can't get access to a grand jury in that sense. It's the prosecutor. Look. If you want to appeal to the prosecutor, be my guest. You know the prosecutor is already apprised now of one aspect of this. And if you want to ask that issue, you may address that, but you don't address that to a court.

We don't override prosecutorial determinations. We don't direct them. That's part of our separation of powers. So you cannot file a lawsuit that says, "I want to have access to the grand jury." That's just not in the cards.

MR. KATHREIN: Well, I find it curious that this Court ignores my allegations of crimes by Mr. Siegel, but [14] instead emphasizes crimes against me that were not even raised by the defendant.

THE COURT: I haven't ignored those in any respect. If you want to bring those, be my guest.

What I find is that your utilization of a domain name that, although you say you own it, is nevertheless the personal name of the person as to whom you have bitter and contentious litigation going in the state court, and somehow having linked that up so that anybody who as I say uses Yahoo or Google and gets the Monar name, is directed to the domain name that you own. And then at least in the earlier time (I don't know what the situation is now, because you keep

changing it), in the earlier time what that would do is to provide access to the most appalling pornographic materials that it's been my privilege to see in a lot of years that I have been on this Court.

I will let the U. S. Attorney make that choice. That's theirs. As you will see at the end of the letter, I don't expect a response from the U. S. Attorney, because courts do not in that sense involve themselves in the process. As long as it's on his table, what he chooses to do, if he chooses to pursue it, if he chooses not to pursue it, it's his decision, not mine. I do have have an affirmative obligation in this situation to have done what I did. So you will see the letter. And as far as I am concerned that's the end of it. I [15] am not going to pursue that.

Thank you.

MR. KINSELLA: Your Honor, one last question. Will there be a written memorandum opinion?

THE COURT: No, just the oral ruling.

MR. KINSELLA: Just the transcript?

THE COURT: Oral ruling.

MR. KINSELLA: Thank you.

MR. KINSELLA: Thank you, your Honor.

(WHICH WERE ALL OF THE PROCEEDINGS HAD AT THE HEARING OF THE ABOVE-ENTITLED CAUSE ON THE DAY AND DATE AFORESAID.)

CERTIFICATE

I HEREBY CERTIFY that the foregoing is a true and correct transcript from the report of proceedings in the above-entitled cause.

JESSE-ANDREWS, CSR
OFFICIAL COURT REPORTER
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION
DATED: June 28, 2005

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MICHAEL L. KATHREIN, Plaintiff,	)	
v.	)	No. 05 C 1718
R. J. SIEGEL, Defendant.	)	

MEMORANDUM OPINION AND ORDER

After this Court's June 28, 2005 dismissal of the Complaint and action brought by pro se plaintiff Michael Kathrein ("Kathrein") – a dismissal that Kathrein appealed immediately – counsel for defendant R.J. Siegel ("Siegel") filed a motion for sanctions against Kathrein under Fed. R. Civ. P. ("Rule") 11. Siegel's counsel had earlier complied with the preconditions to such a Rule 11 motion:

> 1. On May 5 counsel had notified Kathrein of the intent to serve him with a letter and motion pursuant to Rule 11, asking Kathrein to withdraw his Complaint.
>
> 2. On June 8 counsel in fact served the appropriate letter notice demanding withdrawal (Ex. 1 to this opinion), coupling that notice with a Motion for Sanctions that identified (1) sheer harassment and the needless increase in litigation costs as Kathrein's impermissible motivations for bringing this lawsuit (see Rule 11(b)(1)) and (2) a lack of the required

> reasonable prefiling investigation on Kathrein's part (see the introductory portion of Rule 11(b)).[1]

In turn Kathrein has timely responded to the sanctions motion, and Siegel has filed the scheduled reply. Accordingly the motion is ripe for decision.

Just a few words should be said about the 21-day escape hatch set out in Rule 11(c)(1)(A). It is quite true that the June 28 dismissal of Kathrein's action came 20 days after Siegel's June 8 notice. But there is no room for Kathrein to argue that if he had been given the full 21 days he would have withdrawn his pleading: To the contrary, his immediate appeal from the dismissal shows him to be unregenerate on that score. That situation brings into play the discussion in *Methode Elec., Inc. v. Adam Techs., Inc.*, 371 F.3d 923, 926-27 (7th Cir. 2004) (adapted to this case):

> We could conclude that [Siegel was] in substantial compliance with Rule 11; or we could find that it was impossible for [him] to comply with Rule 11; or we could determine that [Kathrein] waived [his] right to a 21-day safe harbor.

Kathrein can scarcely complain that he lacked the full opportunity to withdraw his Rule-11-violative filing.

Now to the balance of Kathrein's response. At the outset he poses a purported jurisdictional objection, asserting that his pending appeal ousts this Court of jurisdiction to deal with the sanctions motion. But in that

---

[1] On June 10, when this Court then established a briefing schedule on Siegel's earlier-filed alternative motion to dismiss or for summary judgment, this Court also indicated that Rule 11 sanctions could be imposed on Kathrein.

regard he mistakenly relies on a Seventh Circuit decision that states the unremarkable principle that after a notice of appeal has been filed, the District Court loses jurisdiction to alter the judgment from which the appeal has been taken. That principle simply does not apply to motions for Rule 11 sanctions – see, e.g., *Cooter & Gell v. Hartmarx, Corp.*, 496 U.S. 384 (1990). As Gregory Joseph has stated in his *Sanctions: The Federal Law of Litigation Abuse* 331 (3d ed. 2004 cum. supp.):

> This jurisdiction-divestiture doctrine is judge-made, not statutory in origin. It is a rule of prudence designed to prevent the confusion and inefficiency that would result if both the district court and the court of appeals were adjudicating the same issues simultaneously. Every circuit to consider the issue has concluded that the doctrine does not apply to postappeal Rule 11 motions or awards. They reason that a Rule 11 motion is separable and collateral from the decision on the merits and, therefore, the district court retains jurisdiction to entertain a Rule 11 application and impose sanctions after the notice of appeal has been filed.

Next Kathrein, under the caption "There is no justification for an award of sanctions in this action," sets out a miscellaneous set of scattershot quotations and statements that really do not bear on his sanctionable conduct that this Court has repeatedly identified and that Siegel detailed earlier in his motion for sanctions and has summarized briefly in his supporting Mem. 4-6. In that respect Siegel has correctly identified Kathrein's bad faith motives of harassment and needlessly increasing litigation costs (see Rule 11(b)(1), as well as the absence of a reasonable

prefiling investigation by Kathrein, causing him also to fail the Rule 11(b)(2) standard.

Finally Kathrein resorts to the type of regrettable name-calling that unfortunately marks the last-ditch tactic of some combatants who lack any meritorious substantive position: He charges this Court with "a spontaneous and malicious bias" against him that "should mandate . . . recusal." But before this litigation began this Court had never heard of Kathrein, and its dim view of him and his litigation tactics was derived solely from the litigation itself. That does not of course call for recusal, and Kathrein's wound in the form of sanctions is totally self-inflicted.

Accordingly Siegel's motion for sanctions is granted. It is supported by a showing of total fees billed for services amounting to the reasonable sum of $20,228, to which Kathrein has responded only with an unwarranted charge of "manipulative billing practices." Judgment is therefore ordered entered in favor of Siegel and against Kathrein in the sum of $20,228.

/s/ Milton I. Shadur
Milton I. Shadur
Senior United States
District Judge

Date: August 23, 2005

EXHIBIT 1

SRZ | LAW One Prudential Plaza
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CHICAGO | EVANSTON

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June 8, 2005

VIA FACSIMILE

Michael Kathrein
7601 Eastlake Terrace
Chicago, IL 60626

Re: *Michael L. Kathrein v. R.J. Siegel*; Case No. 05 C 1718

Dear Mr. Kathrein:

This is to put you on notice that we represent R.J. Siegel in the above-captioned lawsuit. For the reasons stated in our Motion to Dismiss, etc. which has been served on you and for the reasons stated in our Motion for Sanctions, we have concluded and will assert that this action has been filed for improper purposes. It is frivolous and without merit. We, therefore, request that you voluntarily dismiss the action before any further costs and expenses are incurred.

Although you are not a lawyer, your complaint is still subject to the requirements of Rule 11, which require that every pleading or other paper signed by a party certifies

that to the best of the person's knowledge, information and belief, formed after an inquiry reasonable under the circumstances, that the paper:

(1) is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses and other legal contentions therein are warranted by existing law or by a non-frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery. . . .

Fed. R. Civ. Pro 11 (a) and (b).

We have filed our motion to dismiss in the above-captioned complaint. We have also prepared our Motion for Sanctions which is served on you together with this letter. Pursuant to Rule 11 you have 21 days to voluntarily dismiss this action.

Very truly yours,

/s/ Daniel V. Kinsella
Daniel V. Kinsella

DVK/etl
435733_1.DOC

United States District Court
Northern District of Illinois
Eastern Division

Michael Kathrein **JUDGMENT IN A CIVIL CASE**

v. Case Number: 05 C 1718

R.J. Siegel

- ☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury rendered its verdict.
- ☐ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED that final judgment is entered granting defendant's motion to dismiss pursuant to the Rooker-Feldman doctrine.

Michael W. Dobbins, Clerk of Court

Date: 6/28/2005 /s/ Sandy Newland, Deputy Clerk

Michael L. Kathrein
7601 North Eastlake Terrace
Chicago, Illinois 60626
773-761-6000
773-465-7755 fax
federalcase@gmail.com

February 28, 2006

Patrick J. Fitzgerald
United States Attorney
Northern District of Illinois
United States Attorney's Office
219 S. Dearborn Street – 5th Floor
Chicago, IL 60604-1702

Sent by Certified Mail
No. 7003 3110 0002 6517 9209

Dear Mr. Fitzgerald,

I am the victim of an ongoing mail fraud conducted by members of the law firm Schuyler, Roche & Zwirner, P.C., among others, with a business address of 130 East Randolph Street, Suite 3800, One Prudential Plaza, Chicago, IL 60601.

Attached to this letter is partial evidence of that fraud.

As the exhibits show, this is not a case of a law firm merely "padding" its billings. Indeed, SRZ's actions extend well beyond the bounds of reasonable criminal activity.

By comparing the extraordinary fees sought, to their minimal work product, it is plain that the evidence against them is ample and that the fraud nearly proves itself.

Note that SRZ's Petition for Fees includes tens of thousands of dollars for fees previously collected, for services rendered to separate actions, for costs unrelated to that instant action, and for fees charged (as co-defendants)

to themselves, for representing themselves. (Illegal hybrid-representation is another matter.)

I already possess considerable supporting physical evidence of this crime and have good reason to believe that discovery would reveal additional statutory violations.

Therefore, and by this letter, I request direct access to the Special Grand Jury in Chicago, pursuant to my statutory right under 18 U.S.C. § 3332(a). See also *In the matter of In re Grand Jury Application*, 617 F.Supp. 199 (S.D.N.Y. 1985).

This letter is not a request or a demand for you or your office to investigate or prosecute.

Very specifically, this is a limited request for you to arrange for me to present my evidence to the Special Grand Jury in Chicago so that they may consider and perhaps investigate these crimes. Of course, whether or not to indict will and should be, the sole and unfettered determination of the Special Grand Jury.

In addition to the fraudulent Petition for Fees filed by the above named parties, I expect to present other legal information for the Special Grand Jury's consideration:

The elements of mail fraud are a scheme to defraud and use of the mail in furtherance of that scheme. *United States v. Biesiadecki*, 933 F.2d 539, 545 (7th Cir. 1991).

The mail fraud statute proscribes only fraudulent schemes to defraud, and it is not necessary that the scheme to defraud actually succeed. See, *e.g.*, *United States v. Wellman*, 830 F.2d 1453, 1461 (7th Cir. 1987) (the essential elements of a mail fraud offense under 18 U.S.C. § 1341 are a scheme to defraud and the use of the mails in furtherance of that scheme).

Conspiracy to commit mail fraud requires proof of these elements:

(1) that the conspiracy to commit mail fraud existed;

(2) that the defendant(s) became a member of the conspiracy to commit mail fraud with an intention to further that conspiracy; and

(3) that an overt act was committed by at least one conspirator in furtherance of the conspiracy to commit mail fraud.

See *United States v. Shelton*, 669 F.2d 446, 450-51 (7th Cir. 1982) and *United States v. Craig*, 573 F.2d 455, 486 (7th Cir. 1977).

Please advise me as to when I may submit my evidence of these material violations of federal criminal law to the Special Grand Jury in Chicago.

I look forward to your earnest response to this request.

Sincerely,

Michael Lee Kathrein

Attached: PETITION FOR FEES EXPENSES AND COSTS IN SUPPORT OF DEFENDANT MICHAEL MONAR'S RENEWED MOTION FOR SANCTIONS AGAINST PLAINTIFF MICHAEL LEE KATHREIN

MOTION TO STRIKE CO-DEFENDANT CONWAY'S MOTION FOR RECONSIDERATION OF HIS MOTION FOR SANCTIONS

[Logo]

U.S. Department of Justice

United States Attorney
Northern District of Illinois

Everett McKinley Dirksen Building
(312) 353-5300
219 S. Dearborn St., 5th Floor
Chicago, Il. 60604

March 9, 2006

Mr. Michael Kathrein
7601 North Eastlake Terrace
Chicago, Illinois 60626

Dear Mr. Kathrein:

This letter is to acknowledge receipt of your complaint by this office on March 3, 2006. Your complaint does not form the basis for any action by the United States Attorneys Office. Therefore, we are unable to assist you regarding this matter.

It is suggested that you direct any evidence of violations of federal law to the Federal Bureau of Investigation, U.S. Department of Justice, 219 South Dearborn, 9th Floor, Chicago, IL 60604 for any action it deems appropriate.

Very truly yours,

PATRICK J. FITZGERALD
United States Attorney

BY: /s/ Chrissy Stein
Chrissy Stein
Paralegal Specialist